No. 21564

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EMMET WALTER WENDT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

ROBERT F. JOHNSON,
14401 Sylvan Street,
Suite 208,
Van Nuys, Calif. 91401,
Attorney for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Pleadings.

1. Indictment number 35831-CD returned February, 1966, Federal Grand Jury, filed February 23, 1966, in the United States District Court for the Southern District of California, Central Division. Forty-six Counts alleging violations of Title 18 U.S.C. Sec. 641 (receipt of stolen Government property; unauthorized sale of Government property) against various defendants, including Appellant, and One Count alleging a violation of Title 18 U.S.C. Sec. 371 (conspiracy).

2. Order entered pursuant to Rule 37 of the Rules of Criminal Procedure executed and dated August 25, 1966, by the Honorable Russell E. Smith, United States District Judge providing that the Notice of Appeal filed on July 29, 1966, by Appellant Wendt be considered as a Notice of Appeal filed within the time allowed by law.

3. Notice of Appeal dated July 12, 1966, filed by Appellant Wendt appealing the Judgment and decision of the Court to the United States Court of Appeals for the Ninth Circuit.

4. Designation of Record on Appeal filed by Appellant Wendt dated September 2, 1966.

Statement of Facts Disclosing Jurisdiction.

By virtue of the Indictment filed in the United States District Court for the Southern District of California Central Division on February 23, 1966, Appellant was named as a defendant together with certain others wherein it was charged in Counts 1 through 46, that Appellant and certain others had violated Title 18, U.S.C. Sec. 641; receipt of stolen government property; unauthorized sale of government property and in the last and 47th Count, a violation of Title 18 U.S.C. Sec. 371, conspiracy to commit offenses against the United States. Appellant Wendt was charged in Counts 12, 13, 35, 36, 40, 41, 45, 46 and 47 only. Appellant Wendt was adjudged guilty of Counts 12, 41, 46 and 47 only. A timely Notice for New Trial was made before the Honorable Russell E. Smith on July 12, 1966. The motion was denied and thereafter Appellant Wendt filed his Notice of Appeal from the Orders denying the Motion for Judgment of Acquittal; Motion for a New Trial and from the Final Judgment of Conviction entered in this proceeding on July 12, 1966.

In those Counts of the Indictment referring to Appellant Wendt hereinabove referred to, it was alleged in all expect the last and 47th Count, that Appellant Wendt and one Edward Mace S. Clark, without authority, sold, conveyed and disposed of certain aircraft

parts in Los Angeles County and within the Central Division of the Southern District of California, manufactured by Curtis-Wright, which Appellant Wendt and defendant Clark then and there well knew had been stolen and purloined from the United States.

In Count 47 which named all of the defendants named in the Indictment, including Appellant Wendt, it was charged that a conspiracy existed in violation of Title 18, Sec. 371 of the United States Code wherein the defendants were alleged to have unlawfully conspired and agreed together to commit offenses against the United States by receiving, concealing and retaining with the intent to convert to their own use, property of the United States having a value in excess of $100.00, knowing the same to have been stolen from the United States and further to sell or dispose of the same without authority. Appended to Count 47 were twenty-six overt acts alleged to have been committed by the defendants in furtherance of the conspiracy. Appellant Wendt was alleged to have participated in overt acts numbers 2, 3, 13 and 26. These overt acts were alleged to have been committed by Appellant Wendt at Los Angeles County and within the Central Division of the United States District Court for the Southern Division of California. The statutory provisions alleged to have been violated by Appellant Wendt in the Indictment are as follows:

TITLE 18 U.S.C. Sec. 371

Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof,

in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

TITLE 18 U.S.C. Sec. 641

Public money, property or records.

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined not more than $10,000.00 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100.00 he shall be fined not more than $1,000.00 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater. June 25, 1948, c. 645, 62 Stat. 725.

By virtue of the Indictment wherein a violation of the above Federal Statutes was charged, and that the Indictment names Appellant Wendt as having committed the offenses in Los Angeles County, the United States District Court for the Southern District of California, Central Division, had jurisdiction to hear and determine the validity of the charges against Appellant Wendt as contained in those Counts of the Indictment returned against him.

As to those Counts of the Indictment referring to Appellant Wendt, they appear in the Transcript of Record, Volume One, with the Counts and pages as follows:

COUNT	PAGE
12	13
13	14
35	36
36	37
40	41
41	42
45	46
46	47
47	48

Appellant Wendt duly filed his Notice of Appeal to the United States Court of Appeals for the Ninth Circuit pursuant to Rules 37 and 39 of the Rules of Criminal Procedure.

Statement of the Case.

History.

On February 23, 1966, the Federal Grand Jury of the United States District Court for the Southern District of California, Central Division, returned an Indictment charging nine persons, including Appellant Emmet Walter Wendt, with various Counts of a violation of Title 18 U.S.C. Sec. 641, and all of the defendants, including Appellant Wendt, with a violation of Title 18 U.S.C. Sec. 371. Prior to the trial, defendants Don C. Boone, Donald John Nastali and Harold Steel Gray, entered pleas of guilty to one Count alleging a violation of Title 18 U.S.C. Sec. 641, and to Count 47 alleging a violation of Title 18 U.S.C. 371. Disposition of the remaining Counts against these defendants was put over until the trial was concluded. These witnesses were called by the Government as a part of its case in chief. During the trial, defendant Wesley J. Coverdill, entered a plea of guilty to two Counts of the Indictment. The remaining defendants, including Appellant Wendt proceeded to a jury trial before the Honorable Russell E. Smith, Judge presiding on May 2, 1966, which concluded with a jury verdict on May 20, 1966.

Upon the close of the Government's case, Appellant Wendt moved the court for a Judgment of Acquittal on each of the nine Counts referable to him in the Indictment as hereinbefore set forth. After argument, the trial Judge granted Appellant Wendt's motion and ordered Judgment of Acquittal as to Counts 13, 35, 36, 40 and 45. Appellant Wendt then was required to stand trial on Counts 12, 41, 46 and 47. It was upon these latter four Counts that Appellant Wendt was

convicted and now prosecutes this appeal. Counts 12, 41, 46 and 47 which appear respectively on pages 13, 42, 47 and 48 of the Transcript of Record, Volume One, charge him with a violation of Title 18, Section 641 of the United States Code. The fourth Count, being number 47, alleges Appellant Wendt conspired and agreed with his co-defendants to commit an offense against the United States in violation of Title 18, Section 371 of the United States Code.

Count 12 of the Indictment alleged that between April 2, 1965, and September 15, 1965, Appellant Wendt and defendant Edward Mace S. Clark, received, concealed, with intent to convert to their own use, 127 Power Recovery Turbine Wheels (P.R.T. Wheels); 262 Pistons; 27 Shields; 10 Gears; 50 Impeller Shafts, all manufactured by Curtis-Wright, and having a value in excess of $100.00, which, it was alleged, Appellant Wendt and defendant Clark, then and there knew had been stolen from the United States.

Count 41 alleged that on or about July 8, 1965, Appellant Wendt and defendant Clark sold and conveyed of 35 P.R.T. Wheels, which had been manufactured by Curtis-Wright and having a value in excess of $100.00 and which property, Appellant Wendt and defendant Clark then and there well knew had been stolen from the United States.

Count 46 alleged that on or about August 27, 1965, Appellant Wendt and defendant Clark, sold and conveyed of 515 Pistons, which had been manufactured by Curtis-Wright and having a value in excess of $100.00 and which property, Appellant Wendt and defendant Clark then and there well knew had been stolen from the United States.

In Count 47 it was generally alleged that prior to December 1964, and continuing until November 15, 1965, all of the defendants, including Appellant Wendt, combined, conspired and agreed to commit offenses against the United States by receiving, concealing and retaining with intent to convert to their own use, property of the United States having a value in excess of $100.00 and further without authority to sell, convey or dispose of property of the United States of such value or more and knowing then and there that such property had been stolen from the United States.

In Count 47, hereinafter referred to as the "Conspiracy Count", twenty-six overt acts were alleged in which Appellant Wendt was named as having participated in numbers 2, 3, 13 and 26.

Abstract of the Evidence Presented.

During the trial which lasted from May 2, until the return of the jury with its verdict on May 20, 1966, the Government called numerous witnesses in order to establish its theory of the case. The Government's theory and presentation of the evidence, both real and verbal, was designed to show that certain civilian employees at the Alameda Naval Air station at Alameda, California, had access to various parts which were used as replacement parts on an aircraft engine manufactured by Curtis-Wright in New Jersey. These engine parts were stored in huge warehouses, being a Government facility in the Naval Air Station at Alameda. The Government's theory was that certain civilian employees agreed to pilfer some of these parts from the Government; take them off the base without authorization and sell them to various persons. The parts consisted mainly of Pistons, Gears, P.R.T. Wheels,

Shafts and Shields. *All* of these parts were components of a large aircraft engine manufactured by Curtis-Wright and known by the designation of 3350.

It was alleged by the Government and its order of proof sought to show that after the civilian employees at Alameda took some of these parts off the base, they were sold to other civilians in the San Francisco area, who in turn conveyed them to others and who later sold them to aircraft parts dealers in the Los Angeles area. Appellant Wendt was shown to have been in the parts business in Los Angeles for at least fifteen years and was doing business as Western Engine and Supply. In the ordinary course of his business, Appellant Wendt purchased and sold some of the parts similar to those the Government claims had been taken from the Base at Alameda.

It was and now is the Government's intention that not only did Appellant Wendt receive, retain and convey such aircraft engine parts but that he did so with full knowledge *at that time* that the parts, having a value in excess of $100.00, had been stolen from the United States Government. This alleged conduct is set forth in Counts 12, 41, and 46 of the Indictment. In presenting evidence in support of Count 47, the Government sought to show that Appellant Wendt and others, including his co-defendants, conspired together to receive, retain and sell these aircraft engine parts with the knowledge that they had been stolen from the United States Government. By evidence revealed on cross-examination of the Government's witnesses and the presentation of the case in chief and in addition the evidence produced by his co-defendants, Appellant Wendt demonstrated that in his dealings and conduct, as de-

nounced against him in those four Counts upon which he was adjudged guilty, he was acting in the usual and ordinary course of business as practiced by numerous other business enterprises of this kind and was not acting unlawfully in any manner.

History of the Evidence.

Because the facts dealt with personal property consisting of aircraft engine spare parts manufactured by Curtis-Wright on the East Coast and shipped by them to a Navy Facility at Alameda, California, and thereafter taken from Alameda and passed through several hands, individual and corporate, it appears useful to summarize in skeleton form at this point the history of the evidence produced to spell out chronologically the case presented to the jury. The testimony of the witnesses for the Government and the defendants disclosed this chronology:

Elmer Sturm, employed by Curtis-Wright in 1965 as a supervisor, identified numerous physical exhibits present in the courtroom at the beginning of the trial. Sturm identified not only actual physical pictures such as piston, P.R.T. wheels and gears but also shipping tags and other paperwork used in the manufacture and shipping of these items. Sturm testified that the parts are modified constantly and that on numerous parts, shield for instance, he could not tell whether Curtis-Wright had made such a shield because it had no serial number on it. Sturm also testified that after final inspection at Curtis-Wright, no record is kept of any part that might happen to have a serial number on it. Further, he testified that because of the unique nature of the aircraft parts business, Curtis-Wright had even re-purchased some of their own parts back

from other people in the industry to supply a demand from still another person.

Next, because the Government was apparently warned that these people would decline to testify on the grounds that they would incriminate themselves, the Court called as it own witnesses three people; Willard Leon Johnson, also known as Willie Leon Johnson; C. B. Butler and Tony Vierra. Johnson declined to answer any questions on direct or cross-examination and was excused. Butler admitted being employed at the Naval Air Station at Alameda and agreed that he had "access" to the supplies stored there. He said that he could not say one way or the other whether or not the boxes he examined in the courtroom were similar to the ones stored at the Alameda warehouse. After answering these questions, he declined to testify further. Vierra also admitted being a truck-driver but after this admission, declined to answer further questions on the same grounds.

Henry L. Ainliy, Jr., as a Commander in the United States Navy and assigned as the Control Division Officer at the Naval Air Station at Alameda, next testified concerning certain records and explained how overages and shortages are maintained according to certain paperwork. His testimony was limited largely to an explanation of how the records were kept and admitted on cross-examination that he could not tell in spite of his experience and assignment, whether certain paperwork belonged to the Government or to a private citizen. In fact, this witness testified that some of the exhibits introduced were not even prepared under his direction and control but by a civilian supervisor at the same station. When questioned concerning

a box in the courtroom which contained a part similar to those described in the Indictment, he admitted it was impossible to say whether the box had ever been received in the Naval Air Station at Alameda.

Harry Buxton, a civilian employee at Alameda, was produced by the Government to identify certain paper records and tags kept in an overhaul shop at Alameda. Some of these records were not official but were kept by employees for their own personal reasons.

James C. Clemons, called by the Government, admitted he was employed as a civilian at the Alameda Naval Air Station but admitted he never had seen any of the Indicted defendants on trial until he came to the courtroom. When asked directly by the Prosecutor whether he stole some parts from the Naval Air Station, he said he did not take them but he made them "available" and they were taken off the station with his knowledge by a man named Butler. Clemons stated that he and Butler drove a truck off the Alameda Naval Air Station to a man's house in San Leandro and that he had had conversations with defendant Harold Gray and Vierra. He admitted at the trial he was still working at his regular job at Alameda, had not been indicted or charged with any crime by any agency or had been disciplined for his conduct by his employer. When cross-examined concerning some of the physical evidence in the courtroom, he was unable to identify it stating that he could not tell whether or not they had come from his place of employment although he recognized that there were many boxes at the warehouse close to the size of those he saw in the courtroom. His testimony clearly indicated he was dealing primarily with Tony Vierra and he denied that Gray

was buying the goods from him. Donald John Nastali, although indicted, was called as a Government witness after he had entered a plea of guilty to two of the 21 Counts for which he was indicted and was allowed to testify in narrative form. His testimony was interrupted at the beginning by the Court, granting all defendants a "continuing objection" to the testimony and its admission subject to "the ultimate proof of a conspiracy". Nastali outlined that in December, 1964, he had Gray as a partner in his company known as Aero Service in Burbank, and that it was in the aircraft surplus parts business. Further, Gray, while in San Francisco, had the opportunity to buy certain parts, telephoned Nastali and obtained money to buy the parts which were later sold to James Boone in the Bay Area. Apparently Gray's ability to obtain these parts occurred when he met Vierra in a crap game. Because of their experience in the aircraft parts business, Nastali and Gray importuned Vierra to obtain parts for them for resale. Vierra, not realizing the value of these parts, in turn importuned Clemons, Johnson and Butler to obtain them from Alameda.

During the above process, Nastali and Gray obtained these parts and took them to James Boone at his aircraft parts shop. Gray and Nastali told James Boone that they received the material from out of state and that it was surplus.

At Gray and Nastali's business address at Burbank, known as Aero Service, they had some of the parts on display with other material in their store. Gray telephoned defendant Edward Mace S. Clark asking him if he knew anybody who could use any P.R.T. Wheels. During this conversation price was discussed and Clark

indicated the necessity of financial backing in order to purchase them. Clark obtained the necessary purchasing from a Jack Leverwich who purchased some P.R.T. Wheels from Gray and Nastali. Leverwich paid Nastali and Gray but was never indicted for any offense.

Wesley J. Coverdill, a defendant who decided to change his plea during the trial, was identified as a truckdriver who went from the Los Angeles area to Alameda to pick up some of the parts. After Nastali and Gray had returned from the Bay Area with more material, they stocked their shelves at Aero Service with it and thereafter Clark in the usual course of his business came in and saw the material. Clark inquired if the material was for sale and Nastali indicated it would probably go to James Boone because of his prior purchases of similar material from Aero Service. Indicating interest in the material, Clark asked its price and was told $10,000.00. Some days later Clark walked in with Appellant Wendt who likewise indicated interest in the material explaining he had been in the parts business for more than fifteen years and inquired as to price and terms. Two days later, Appellant Wendt returned offering to pay $10,000.00 for the parts with $5,000.00 down and the balance later. This partial payment was made and Appellant Wendt took a portion of the material, namely, P.R.T. Wheels, at that time. This transaction was made in the ordinary course of business with checks and receipts as evidence of the transaction. The balance of the $10,000.00 was paid by Appellant Wendt within a week. Further purchases were made by Wendt from Aero Service in the usual and ordinary course of business. Nastali admitted readily that the parts business is very unique and that many people conduct a rather large operation from small fa-

cilities or even their home. Further, Nastali admitted that the value of the location of a particular set of parts is the key to success in this business. He further stated that for so long as he could remember there was no standard mark-up on parts and that it was quite customary to sell parts by the "Lot" rather than designate each part by serial number, part number or other extensive description. Nastali concluded his testimony by reiterating that he had sold numerous parts to James Boone that he felt were stolen but that James Boone bought in the ordinary course of business and for which he was never charged or indicted. On cross-examination, Nastali admitted that he double-crossed his partner, Gray, and made at least $10,000.00 on these "side transactions".

Milford Ingham called by the Government, identified himself as an employee at Alameda who had done rework on the P.R.T. Wheels. He admitted the P.R.T. Wheels go practically all over the world and may be overhauled in Japan, San Francisco or any place else. After reworking one of the wheel exhibits to him, he stated he never saw it after 1960.

Don C. Boone, (no relation to James Boone) acted as the truck driver for Gray and Nastali and testified that on one occasion Appellant Wendt was present with a Mr. Paul Long who purchased parts from Nastali and Gray in the Bay Area. Don Boone first met Appellant Wendt on March 17, 1965, when Boone, Nastali and Coverdill were drinking and Wendt entered the restaurant for a few brief moments and then left. Boone admitted several times under cross-examination that he had never had any inkling until this time that any of the material that he was trucking was

stolen and further admitted that such conversations or information came to him *after* Appellant Wendt had left the restaurant after a brief visit. Don Boone agreed with Nastali to doublecross Gray and to obtain parts from Alameda without his knowledge and without splitting up the profits with Gray. He further admitted that after making this doublecross agreement with Nastali, he immediately left the restaurant and went to Gray's house and took $2,900.00 from him. Don Boone admitted under cross-examination that Appellant Wendt had never given him a single cent and that he had not delivered any material of any kind to Appellant Wendt at anytime.

James McCauley, an agent for the FBI was called by the Government to identify several parts which had been recovered from California Air Motive Company in North Hollywood and from other persons, firms and corporations in the area. McCauley testified that he recovered nothing from Mr. Wendt, although Wendt's home, garage and premises had been searched under the authority of a search warrant. McCauley admitted that he had several conversations with Appellant Wendt and that Wendt was extremely cooperative in producing checks, vouchers, receipts and other records concerning Wendt's transactions with Aero Service. McCauley pointed out that Wendt was not secretive in his discussions with the FBI but that he actually had dug through his records to provide as much information as possible for the evidence of the Government. In Fact, Wendt even disregarded the advice of his own attorney up to a point by providing access to his records for the use of the Government. At no time during his discussion did Wendt state or even hint that he was aware that

the material that he had purchased might have been stolen from anybody.

Francis J. Christian, called by the Government, stated that he was an aircraft mechanic and inspector with long experience. He stated that he had examined certain material in San Francisco at the request of Clark as to its acceptability for use in the Curtis-Wright engine. On cross-examination Christian admitted he was undergoing a naturalization process and would definitely stay clear of anything that might jeopardize his application.

Jack Lebovitz called by the Government, testified that Clark advised him that Nastali and Gray had surplus aircraft parts for sale and as a result of this Lebovitz purchased $2,500.00 of the parts. Lebovitz stated it was common practice in the business never to inquire from the vendor of such parts as to their source and further that he had no qualms or reason to suspect anything wrong with the parts or their source when he bought from Gray and Nastali. In turn, Lebovitz sold the parts he had purchased to Aircraft Cylinder Company, who later did not inquire as to their source. Neither Lebovitz or Aircraft Cylinder was ever charged or indicted.

William Jones, doing business as Aircraft Cylinder Parts, testified that he purchased the items from Lebovitz and that he had no reason to suspect anything being wrong about their title. He testified that the aircraft parts business is a "very unique one" and that it is a top trade secret as to the location of various parts which may be in demand throughout the world. He further explained to the jury that the mere fact that the boxes or packages containing aircraft en-

gine parts has certain serial numbers, markings or other designation is given little significance from someone in the trade.

James G. Boone, called as a witness by the Government, is and was in the aircraft part sales business. He testified that he purchased some Aero Service (Gray and Nastali) Curtis-Wright engine parts and that he had been approached by Gray in February of 1965 who asked him if he was interested. His business relationship with Gray and Nastali continued from February through July, 1965. He testified that on one occasion he purchased 65 pistons for $25.00 each and sold them for $100.00 each for a 300% profit. He testified that this was not unusual at all in this business and that during his dealings with Gray and Nastali he netted approximately $25,000.00. As a part of this profit, he testified that he purchased some P.R.T. Wheels from Gray and Nastali for $250.00 and sold them for $1250.00 for a net profit of $1,000.00. Boone testified that the parts that he bought from Gray and Nastali, he turned around and sold to Grand Central Aircraft Company; Northwest Airlines; Trans Air Supply Company, United Airlines and the Air Motive Inc. Although James Boone had previous dealings with Nastali and Gray he has never been charged or indicted for any crime in connection with his transactions with them.

R.D. MacKenzie, called by the Government, testified he is also employed by Air Motive Inc. as sales manager and that in behalf of his company he purchased Curtis-Wright engine parts from Appellant Wendt, specifically 515 pistons. These pistons were obtained from Western Engine and Supply (Wendt) without any hint or suspicion that they had been stolen from

anybody or any suspicion as to their source. MacKenzie was familiar with James Boone and his company and the engine in question (3350). MacKenzie has known Wendt for approximately eighteen years. MacKenzie verified that the aircraft parts business is unique and unusual and that it is very customary to buy parts by the "lot" and that the amount of price mark-up varies extremely. MacKenzie testified that some of the parts he sold to airlines and that the rest were recovered by the U.S. Marshal at the time the defendants were arrested. MacKenzie testified that at no time during his eighteen years of business dealings with Wendt did he have any reason to suspect Wendt or the manner in which he conducted his aircraft parts business.

Robert J. Dixon, called by the Government, this witness stated he did business as Sky Parts Incorporated and that he discussed a purchase from Appellant Wendt of certain aircraft parts. He further confirmed that it is not a general practice in any business to ask the source of the material, it being a trade secret to all concerned. He described a purchase from Western Engine and Supply (Appellant Wendt) as a courtesy for a Mr. Nielsen. He confirmed further that in his business dealings with Wendt it was equitable all the way through and that he had no reason for suspicion and that his dealings were all in the ordinary course of business as he had conducted them throughout his career. Dixon further testified that the purchase was made for the purpose of re-sale which is a customary method of making a profit in this business.

Raymond Connors—This witness had no dealings with Western Engine and Supply of any kind.

Robert C. Holmes—This witness, a member of the FBI, identified certain parts and documents and confirmed the testimony of the preceding witness as to the chronology of sales and multiple re-sales of the material.

Emmet Walter Wendt (Appellant)—This witness testified in his own behalf and related in substance that he had been in the aircraft parts business for eighteen years. Further, he had been a consultant for Atlas Corporation in New York and International Aircraft Services. He testified that he has had contracts with the United States Air Force for as high as $700,000.00. He has done business with many many parts dealers throughout the U.S., Canada, Central America, South America, Italy and Europe. He has seen parts identical to those displayed in the courtroom as being the aircraft engine parts described in the Indictment as far away as Sao Paulo, Brazil, and also in the possession of Varig Airlines. He testified that as a general rule purchases and sales are made on a "lot" basis. That they are made from Governments who are selling surplus such as the United States, South American and European Governments. He read from an aviation sealed bid sale, dated August 13, 1965, from Norfolk, Virginia, a publication put out by the Federal Government. He identified this as one of the documents he receives by being on the U.S. Government mailing list. Appellant Wendt testified he *did not* know who the owners were of Aero Service prior to April, 1965, although he vaguely remembers such a company existed. He never had any dealings with Aero Service prior to April, 1965, or with its owners, Nastali and Gray. He testified that he has a bonded warehouse in Dallas, Texas, and that he has a number of engines for sale

there when the opportunity presents itself. He testified that when he went into Aero Service he saw shelves with numerous parts on them for inspection and which were for sale. At that time, he had a conversation with Nastali concerning the possible purchase of some of these items. On the first occasion he discussed purchasing shafts and gears. Nastali wanted to sell these parts as a "lot". In fact, Nastali insisted on selling the "entire lot". The asking price was $10,025.00. Appellant Wendt replied he would purchase the lot for $10,000.00, stating to Nastali that the P.R.T. Wheels were a good item and similar to those he had seen at the Fiat overhaul base in Toreno, Italy. Nastali agreed to the sum of $10,000.00 for the entire lot and Wendt stated he wanted to pay $5,000.00 at that time, take the P.R.T. Wheels for inspection and later on check on the remaining material and make the balance of the purchase price. Nastali wanted the money in cash, although Wendt had sufficient funds in the bank to write a check for $5,000.00. Wendt testified that it was not unusual to demand cash, in fact the Federal Government requires a certain portion to be paid in cash or certified check when it sells surplus parts to any buyer. Wendt cashed his own check for $5,000.00 and purchased the material and received a receipt therefor. Wendt called an inspector (witness Frank Christian) who inspected the parts and found them to be in accordance with the specifications required by Wendt's purchasers. Appellant Wendt flatly and categorically denied that at any time Nastali informed him that the parts were stolen or made any statement to hint that they were anything but legitimate merchandise. Appellant Wendt further described that he had had some seven transactions with Aero Service after April, 1965,

and that he had purchased wheels, pistons, impeller shafts and gears. Wendt denied that he ever knew Tony Vierra, C. B. Butler, Clemons, Willie Leon Johnson, or any of the other individuals connected with Alameda Naval Air Station. He testified that some of the P.R.T. Wheels he had purchased from Aero Service were sold to a Mr. Happe in New York for resale back to the Curtis-Wright factory. He further identified the sale of 515 pistons to Air Motive for $50.00 per piston, having purchased them for $30.00 each. Wendt further testified that he travels by airplane between 75,000 and 100,000 miles a year, visiting various places where aircraft engine parts are bought or sold. During his eighteen years of experience he has never been charged with any crime or improper practice in his business or otherwise until this Indictment was returned against him.

Wendt testified that in so far as the overt acts alleged against him in Count 47 of the Indictment are concerned, and specifically overt act 2, he might very well have had a conversation with Edward Mace S. Clark on or about April 1, 1965. That this would be possible because Clark had advised him of a possible source of useful parts at Aero Service. That any such conversation was innocent and not in the course of any conspiracy but actually in the ordinary and usual course of his legitimate business. That in so far as over act 3 (Count 47), he did pay the balance of the purchase price of the parts to Aero Service to one of its owners, Gray. In so far as overt act 26, he did pay to Aero Service, $5,000.00 on or about April 20, 1965, as the downpayment on that portion of the first lot of parts purchased from Aero Service. That this payment was not part of any conspiracy whatsoever but

was in the usual and ordinary course of business. In so far as overt act 13, he met Mr. Don C. Boone for the first time in a restaurant somewhere in the Bay Area and that at no time did he have any telephone conversation with Don C. Boone. Appellant Wendt further recounted that his purpose in going to the Bay Area was to contact Mr. Dixon in furtherance of a legitimate and usual aircraft engine parts sale and for no improper reason.

Appellant Wendt testified as to his conversation with FBI agent McCauley and his cooperation in the production of business records, checks, receipts and other facts for evidence. He quoted McCauley as stating that he (McCauley) realized that the custom and source of where aircraft parts were purchased was a confidential matter, however, that he as an FBI agent was conducting an investigation and would appreciate assistance. Wendt advised McCauley he would be happy to cooperate and disclose evidence available to him upon request by McCauley. Wendt further outlined his discussions with his corporate attorney, Jack Swink, who advised Wendt that if the FBI happened to contact a customer that it would jeopardize future business relations. Although Wendt finally did heed his lawyer's counselling, he stated to McCauley that he wished very much to assist further but that since he had an attorney he felt it wise to follow the advice given.

Russell E. Randall, Brig. Gen. USAF—This witness called by the defendant Magdalik, testified that he is a Brigadier General in the United States Air Force, having graduated from West Point in 1925, and had been in the Air Force until 1949, at which time he retired. He was assigned to Korea to assist in the South

Korean Air Force during which time he was instrumental in buying and selling materials to the South Korean Air Force from several surplus outlets. This included the U. S. Government surplus market. He joined a corporation in Washington D.C. known as Defense Export Corporation which dealt solely in surplus buying and selling. By virtue of his experience, he was well familiar with surplus aircraft parts and particularly the boxes in which they were shipped. He testified that sometimes there is and sometimes there is not something on the boxes to indicate the source of the material contained therein. Sometimes they were sold in open lots; sometimes by weight; and sometimes by classification or nothing at all. On cross-examination by the Government lawyer, the General was handed an exhibit indicating that the contents of the box was manufactured by Curtis-Wright. In answer to the question as to its source, he testified that the markings on the box would not indicate its source or who disposed of it or where it might come from.

Herson B. Clampitt—This witness called by Appellant Wendt testified that he is a Vice-President of the Bank of America and Manager of its Toluca Lake Branch, and has been associated with the Bank for over forty-two years. Clampitt has known Wendt for 13 years and in a business capacity for about 10 years, maintaining a business and personal account at Clampitt's Branch under the name of Western Engine and Supply Company. During this period of time, Clampitt as agent for the Bank, has made numerous loans to Wendt in his business enterprises and testified that they were all done in the usual and ordinary course of business with no suspicion ever arising from any transaction.

Questions Involved and Specification of Errors.

1. The Trial Court erred in refusing to grant the motion of Appellant Emmet Walter Wendt for Judgment of Acquittal of the offenses charged in Counts 12, 41, 46 and 47 of the Indictment.

2. The evidence is insufficient as a matter of law to justify a finding of guilty as to Appellant Emmet Walter Wendt as to Counts 12, 41, 46 and 47 of the Indictment for the reason that there is no competent evidence to show that Appellant Wendt sold, received, concealed or retained any property with intent to convert it to his own use or gain knowing the same had been embezzled, stolen or purloined *from the United States of America.*

I.

The Trial Court Erred in Refusing to Grant the Motion of Appellant Emmet Walter Wendt for Judgment of Acquittal of the Offenses Charged in Counts 12, 41, 46, and 47 of the Indictment.

The heart of Appellant Wendt's contentions is pointed up by the remark of the Trial Judge during Wendt's motion for Judgment of Acquittal after the Government's case. Following the remarks of Wendt's counsel during the opening portion of his argument pursuant to Rule 29, the following occurred:

> "The Court: You see what I am concerned about and my only concern is that is there anything here from which we can't infer that he knew that this was stolen from the United States. If that's essential—I don't know. That seems if a fellow goes out and buys poperty that he knows to be stolen, I think he should be stuck with it if it happens to be stolen from the United States. Maybe that isn't the law but—
>
> Mr. Rogan: Your Honor, may I interrupt and cite you a case which has that kind of language in it?
>
> The Court: Yes, if you have got a case on that.
>
> Mr. Rogan: Just while you bring up that point, that's the case of Sousa against the United States.
>
> Mr. Barnett: I gave that to the Court.
>
> Mr. Johnson: I will agree, Your Honor, You see—
>
> Mr. Rogan: Excuse me, Mr. Johnson. Let me read this one paragraph from the Sousa case. 'Not only was the jury instructed but the prose-

cution was required to prove beyond a reasonable doubt that the property described in Counts 2, 3 and 4 was the property of the United States; that the same was sold or conveyed by appellant without authority and that each sale or conveyance was made by appellant with knowledge on his part of ownership of the property by the United States but also with knowledge that the property had been stolen from the United States.'

Mr. Johnson: That was my understanding of the law, Judge.

The Court: That seems to bear out your statement."

The Government's case relied and must now stand heavily on the proposition that Wendt *knew in fact* that the pistons, P.R.T. wheels, shafts, gears and shields which he bought from Aero Service in the several transactions in the few months he dealt with Aero, were in truth and in fact stolen from the *United States Government*. Unless the evidence is sufficient *as a matter of law* to establish this peculiar type of knowledge, no *Federal* offense has been committed. Therefore, from the remarks of the Honorable Russell E. Smith, who, as the Trial Judgment made the above observation, it would appear that Wendt even though he buys property that he knows to be stolen, he can not be "stuck with it" if it *happens to be stolen from the United States*. The Trial Judge, indicating that this was not perhaps the law, is still therefore bound by the law on this subject which states as follows:

"Mere omission from U.S.C. 641, which makes it a criminal offense to embezzle, steal, purloin or knowingly convert Government property, or to

> receive, conceal or retain the same, knowing it to have been stolen, of any mention of intent, will not be construed as eliminating that element from the crime denounced."
>
> *Morisette v. U.S.,* 342 U.S. ...., 96 L. Ed. 288, 72 S. Ct. 240.

A careful reading of Section 641 of Title 18 of the U.S.C. leaves out the word "intent". This word is supplied by *Morisette.* In other words, in order to commit a violation of Section 641, it is necessary that one either buy, sell, convert or retain certain property, *all the while knowing* that it has been stolen or purloined from the United States.

The only testimony adduced by the Government pointing towards Wendt as having this guilty knowledge comes from defendant Nastali who testified as follows:

> "So we turned around there and we said, 'well, you know this stuff is stolen to start with,' and Mr. Wendt says 'Yes.' He says, 'Yeah, but there is no problem.' He says, 'I can cover up for this material being here.' He says, 'Well, how'—Mr. Wendt says, Well, I've got—I just got through buying out an inventory in South America.' And if he did or not, I don't know. An airline inventory.
>
> He says, 'I can tell people it came from there and if worst come to worst,' he said, 'I can always ship it back to South America to cover it back up and then ship it back here to cover it up.'
>
> And I said, 'Okay, swell.'" [R. T. Vol. 2, p. 322, lines 7-19].

No reasonable person could infer or even speculate these words that the property had been stolen from a *particular source* and more particularly from the United States Government.

The only other possible evidence that could point to the character of the victim from whom anything had been stolen, appears in the testimony of defendant, Don C. Boone, who testified:

> "Q. Now, prior to that sir, had there been any conversation about the material itself? A. Yes, sir, there had. We were sitting—we were sitting there talking—
>
> Mr. Johnson: May we have an identification as to who was present, Your Honor? A. Myself, Mr. Wendt, Mr. Long, and Mr. Clark.
>
> Q. (By Mr. Barnett) Continue sir. A. We were sitting in the booth talking and Mr. Long wanted to know if there had been any trouble getting the items through the gate. And I said, 'No, it's already at my house. It's already there.' And then Mr. Wendt said, 'There had never been any problems in the past.' So then we went over to my bank where I deposited—I had to deposit at my bank. It's a small branch, and it's a very small branch, and they didn't have enough money to cash these items. So I had to deposit it to my account. I wrote a check there for $10,000.00 which Mr. Long and myself counted out. Mr. Long kept the money in a large envelope, and we went from there to the Elmhurst branch which Mr. Wilcox who runs the branch, the bank where I do the business, had called to clear the check, and I wrote another for $8,000.00, which again Mr. Long kept

> until we got over to my house. When we got at my house after Mr. Long and Mr. Clark and Mr. Wendt had all inspected the material and took an inventory on it, then they gave me the large envelope. Mr. Long and Mr. Wendt got in the truck and left. Where to, I don't know. Where to, I don't know. I assume they were going to Mr. Long's place of business in Redwood City." [R. T. Vol. 3, p. 515, line 9, to p. 516, line 15].

Here again, there is no mention made of any fact fom which it can be inferred that the property being discussed was *stolen* from the *Federal Government.* It would thus appear that at the time counsel for Appellant Wendt moved the Court for Judgment of Acquittal as to the then nine Counts of the Indictment upon which he was charged, the Trial Court was proceeding under the mistaken belief that simply because a fellow "goes out and buys property that he knows to be stolen" he should be "stuck" with it if it *happens* to be stolen from the United States. It is interesting to note that in Count 12 of the Indictment, upon which Wendt was found guilty, that he is charged therein with what is commonly known as "receiving" certain engine parts with the knowledge that they were stolen from the Federal Government. In the very next Count (13), Wendt is charged with selling this very same property with the identical knowledge. Since the evidence is practically without dispute that Wendt sold certain items, some of which are described in Count 13, to Air Motive Inc., and upon which Count (13), his motion for Judgment of Acquittal was granted, is it possible that he "forgot" about the stolen character of the parts and further that they were stolen from the United States?

The Government makes much of the fact that Wendt was associated with or did business with other airplane engine parts dealers and inferred that there is something wrong with this. The law on this subject is indeed broad but not all of it is in favor of the prosecution side of the fence.

Presumptions of guilt of conspiracy are not lightly to be indulged from mere meetings.

United States v. Di Re, N.Y. 1947, 332 U.S. 581, 92 L. Ed. 210, 68 S. Ct. 222;

Rent v. U.S., CA Tex. 1954, 207 F. 2d 893.

Conspiracy cannot be established by mere inferences no more valid than other equally supported by reason and experience.

Reiss v. U.S., CA Mass, 1963, 324 F. 2d 680.

Guilt of conspiracy may not be inferred from mere association.

Evans v. U.S., CA Cal. 1958, 257 F. 2d 121;

Causey v. U.S., CA Ga. 1965, 352 F. 2d 203.

Evidence of conspiracy even if circumstantial must be such as to establish beyond reasonable doubt a defendant's agreement to, or participate in place to violate the law.

United States v. Webb, CA Ky. 1966, 359 F. 2d 558.

Neither association with conspirators nor knowledge that something illegal is going on by themselves constitute proofs of participation in conspiracy.

United States v. Webb, supra.

Conspiracy may not be inferred from mere association and trial judge must guard against such possibility any scrutinizing evidence as to each defendant before submitting case to jury.

United States v. Hickey, CA Ill. 1966, 360 F. 2d 127;

Panci v. U.S., 5th Cir. 1958, 256 F. 2d 308;

United States v. B. Bufalino, 2nd Cir. 1960, 285 F. 2d 408.

Perhaps the best and most succinct statement of the absolute requirements of a violation of Section 641 of Title 18, U.S.C. is set forth in *Cohen v. U.S.,* N.Y. 1919, 258 Fed. 355, wherein the requirements for conviction were set forth as follows:

"It is incumbent upon the Government to prove beyond a reasonable doubt;

(a) That the property was in fact stolen from the United States;

(b) That the defendant received or retained in his possession with intent to convert to his own use or gain; and

(c) That he received or retained it with *knowledge* that it had been stolen from the *United States.*" (Emphasis added).

Since there was no retreat by the Trial Judge from his guidelines announced during his ruling on Appellant Wendt's motion for Judgment of Acquittal after the Government's case [R. T. Vol. 6, p. 1127, lines 4-12] and because of the unusual nature of the rulings of the Trial Court on the Motion as they affected Counts 12 and 13, Appellant Wendt submits that the Court erred in allowing Counts 12, 41, 46 and 47 to remain for the jury's consideration.

II.

The Evidence Is Insufficient as a Matter of Law to Justify a Finding of Guilty as to Appellant Emmet Walter Wendt as to Counts 12, 41, 46 and 47 of the Indictment for the Reason That There Is No Competent Evidence to Show That Appellant Wendt Sold, Received, Concealed or Retained Any Property With Intent to Convert It to His Own Use or Gain Knowing the Same Had Been Embezzled, Stolen or Purloined From the United States of America.

In recognizing the absolute requirement that Appellant Wendt be saddled with *actual knowledge* of the two elements concerning property which he received, retained or sold, namely that they were in fact *stolen* and further that they were stolen from the *United States Government,* the prosecution attempted to satisfy its burden by the character of the meetings between Wendt and Aero Service (Nastali and Gary). The prosecution was unable to demonstrate any prior dealings between Aero Service and Appellant Wendt and but for a volunteered statement by Nastali without any apparent reason on his part or motive for gain (indeed it would seem that such a statement would have killed a sale to a stranger) the Government presented no competent or sufficient evidence to implant the absolutely required element of "stolen Government property" in the mind of Wendt. There is no question in the mind of anyone now familiar with the aircraft engine parts business that it is a unique and unusual one.

All of the witnesses familiar with the business, or engaged as such, agree that knowledge of the location and value of a particular part is a highly-kept trade secret. No one as buyer or seller, expects the source to be disclosed and it appears unusual to even ask.

The overt act charged against Appellant Wendt in Count 47, of the Indictment as number 2 [Tr. of Rec. p. 48, lines 31-33], is certainly an innocent bit of conduct by both Appellant Wendt and Clark because Clark was apparently unable to purchase the material at the asking price and it may reasonably be inferred that on or about said date Clark advised Appellant Wendt of the existence of these materials and that following such advice Wendt became interested [R. T. Vol. 2, p. 319, lines 13-16].

The overt act charged as number 3 in Count 47 of the Indictment [Tr. of Rec. p. 49, lines 1-3] was obviously the proper payment for the purchase of parts previously discussed as was the conduct described in number 26 of the overt acts of the Indictment [Tr. of Rec. p. 49, line 29, to p. 50, line 1].

It is not the intention of Appellant at this time to review each and all of the exhibits referred to or admitted into evidence. These exhibits included aircraft engine parts, not only of heavy weight but of greasy description. The paperwork indeed required many hours of review and likewise will not be dissected by Appellant Wendt. The crux of this case and the obvious tenor of the defense present at the time of trial and indeed upon this appeal by Appellant Wendt is that;

(a) There was insufficient evidence to show that Wendt knew the property was stolen; and

(b) That he received, retained or conveyed the same *with knowledge* that it was in fact *stolen* from the United States.

It is therefore respectfully submitted that the Court erred in refusing to grant Appellant Wendt's motion for

Judgment of Acquittal as to Counts 12, 41, 46 and 47 and that the evidence is insufficient to support a conviction thereof as set forth in the Indictment. Appellant Wendt therefore requests that the Judgment be reversed and that because of the insufficiency to establish the commission of the Federal offenses charged, that a Judgment of Acquittal as to these remaining Counts be entered.

Respectfully submitted,

ROBERT F. JOHNSON,
Attorney for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT F. JOHNSON